UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: DEALER MANAGEMENT SYSTEMS ANTITRUST LITIGATION AUTHENTICOM, INC., et al., Plaintiffs, vs. CDK GLOBAL, LLC, et al., Defendants.	No. 18 C 864 Chicago, Illinois August 14, 2020 10:41 a.m.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JEFFREY T. GILBERT

APPEARANCES:

For the Plaintiffs: KELLOGG, HANSEN, TODD, FIGEL & FREDERICK P.L.L.C.
BY: MR. DANIEL V. DORRIS
MR. DEREK TAM HO
1615 M Street, NW
Suite 400
Washington, D.C. 20036
(202) 236-7900

For CDK Global, LLC: MAYER BROWN LLP
BY: MS. BRITT M. MILLER
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Official Court Reporter: NANCY L. BISTANY, CSR, RPR, FCRR
219 South Dearborn Street, Room 1706
Chicago, Illinois 60604
(312) 435-7626
nancy_bistany@ilnd.uscourts.gov

APPEARANCES: (Continued)

For The Reynolds & Reynolds Company:

GIBBS & BRUNS LLP
BY: MR. ROSS M. MacDONALD
MS. AUNDREA K. GULLEY
1100 Louisiana, Suite 5300
Houston, Texas 77002
(713) 650-8805

(Proceedings heard telephonically and in open court:)

THE CLERK: 18 Civil 864, In Re: Dealer Management Systems Antitrust Litigation, for telephone conference.

THE COURT: Okay. Good morning, everybody. It's Judge Gilbert.

We're on the record. We have a court reporter, Nancy Bistany. And I'm going to ask counsel who want to be reflected as appearing of record to state their appearances now and then also to send an email to our court reporter directly with your, you know, name and appearance information to Nancy, Nancy_Bistany@ilnd.uscourts.gov.

And I'm also communicating a request from our court reporter that when you speak, you speak clearly, slowly, and into the microphone and also identify yourself before you speak so the proper name can be associated with the person who is speaking.

Okay. Let's start with appearances for plaintiff or plaintiffs, and then we'll move to defense counsel.

MR. DORRIS: Good morning, Your Honor.

This is Dan Dorris for -- from Kellogg Hansen on behalf of Authenticom.

MR. HO: Good morning, Your Honor.

This is Derek Ho, also from Kellogg Hansen.

THE COURT: Anybody else on the plaintiffs' side?

Okay. For the defendants?

MR. MacDONALD: Good morning, Your Honor. This is -- good morning, Your Honor.

This is Ross MacDonald of Gibbs & Bruns for defendant, The Reynolds & Reynolds Company.

And also on the line is Aundrea Gulley, also of Gibbs & Bruns.

THE COURT: Okay. And just FYI, you're a little bit garbled or breaking up. I don't know if it's because you're speaking on a speaker from a cell phone, or whatever, just FYI.

And any other appearance?

MS. MILLER: Good morning, Your Honor.

Britt Miller of Mayer Brown on behalf of CDK Global, LLC.

THE COURT: Okay. Anybody else?

And, Ms. Miller, we heard you fine.

MS. MILLER: Thank you, Your Honor.

THE COURT: Okay. Are you all hearing me? If you're not hearing me, say so, okay, like now.

(No response.)

THE COURT: Okay. Good.

Okay. This is the way I think we ought to proceed here. I mean, I -- as you know, I sent you pretty detailed inclinations based upon the review of the documents, and I wanted -- I wanted you to have those in advance of the hearing. I thought it would expedite matters before the hearing,

frankly, and I thought it would make this a lot easier, particularly by remote means.

As I've reviewed the letter, I think -- I mean, I don't really have anything more right now to say than I said there. I thought maybe the best way to proceed is for whoever the party is who came up with the short end of the stick on my work product rulings to -- we can go through these one by one and see -- you know, see if you -- if I missed something or something that would change my mind.

And then as you know, for particular documents I have some questions that I wanted to raise, so we can address those. But I -- unless somebody feels that you'd like to proceed differently, that's the way I would like to proceed.

Any dissents on that?

Okay. So, I mean, I'm just using my letter as a reference as well as the documents in front of me. There are a lot of documents here, like the first document in Tab 1, and I explained why I do not think these are covered by the work product privilege. I think this is an issue that plaintiffs came up short on.

So if Mr. Dorris or Mr. Ho want to tell me something that I'm missing here, either legally or factually or analytically, I'm -- I'm all ears.

And then FYI, just what I would think I would do is after our hearing and after my rulings are finalized, I would

enter an order with the rulings in it in case anybody wanted to appeal it and so it would be of record. I kind of modified what I've got in the letter and put that into an order.

So, plaintiffs, on these -- all of the documents really that are variations of the same thing, the email communications about the information getting to -- that needed to get to the FTC, anything further you want to add? Do you think you can convince me otherwise, or should we move to the next one?

MR. DORRIS: Yes, Your Honor. On this one, I take it the Court's inclination --

THE COURT REPORTER: Can you please state who you are? I'm sorry. Please state your name.

MR. DORRIS: My apologies. Dan Dorris.

Your Honor, I believe this Court's inclination was that this was not in anticipation of litigation because it was a communication with the FTC. And I submit that the -- the standard here is a little different.

When there is an ongoing investigation of a government agency, there are case -- the cases recognize that that is litigation. And documents and attorney work product created in the course of that investigation are protected work product.

And I would just give you one -- one cite, among others, and that's 1992 Westlaw 281322 SR5 where a federal

agency had identified a specific entity that it was investigating, and the court held the work product privilege did apply there and that that's what occurred here. As you can tell from the Bates email that's changed, that December 2016, there were ongoing meetings with the FTC where they had identified Reynolds and CDK as the subject of an investigation. And, indeed, several months later, the FTC -- we don't know exactly for sure when they opened it, but we do know that Authenticom received a formal process in that investigation in August 2017.

So this -- this was an actual ongoing investigation, and this was work product created in anticipation of that litigation. And Authenticom as an interested third party and, indeed, one who was ultimately subpoenaed by the FTC could force -- could concretely proceed being involved in that litigation by the FTC.

THE COURT: And the case that you cited -- I'm sorry. Go ahead.

MR. DORRIS: And second, even apart from the ongoing FTC litigation, as this -- I think the Court recognized in Tab 12, there was considered private litigation at that time as well. That Tab 12 concerns a document from August 2016 demonstrating contemplated private litigation.

And given how closely related the FTC's investigation and the private litigation was at the time, the work product

for one was necessarily work product for the other. They were the same attorneys working on the same case, presenting the same theories, those anticompetitive conduct by CDK and Reynolds. And so work product created in the context of one is necessarily work product for the other.

THE COURT: And, Mr. Dorris, you cited -- you gave me Westlaw cite, 1992 Westlaw, I think you said, 281322 at page 5. What's the name of that case, and where is that cited in your memorandum in opposition to defendants' motion to compel, which is ECF 571?

MR. DORRIS: That case is -- the title *ChemCentral/Grand Rapids Corp. versus EPA*. And that's -- that's not cited in our opposition and I think because these issues were not briefed by the defendants when they filed the motion.

THE COURT: Well, I guess I beg to differ on that last point. That's one reason why we're here is because you told me at a different status hearing that the issues had been briefed, had been presented. I didn't think they were presented as well as they could have been; but nevertheless, I mean, you know, in your opposition brief, for example, at page 12 of ECF 571, the subheading there is: "Many of the Challenged Communications Are Also Work Product." And you make some arguments there over a few pages.

But you didn't cite me this case in your opposition

brief, and you're now doing it in oral argument. I just think you're too far down the line, A, to cite me that case. B, I disagree that this series of emails would be work product for the reasons I put in my inclinations. Also, because this starts with an email from AutoLoop's Tony Petruzzelli sharing an article from Automotive News with a bunch of email recipients, I mean, sending a -- I don't think that simply sending an article to a bunch of people is going to be shielded by work product under the standards that apply there.

In addition, I don't see a linkage between the communications with the FTC responding to their request for information, and the -- I don't see how that is related to the -- an actual anticipated litigation that Authenticom is going to be filing here or ultimately did file.

These were -- in my mind, there's no linkage in the factual email. It involves in some way different counsel, different people involved in this. It is certainly an effort that people were engaging in to attempt to get governmental intervention here, agency intervention. I'm not sure how successful it was or wasn't in terms of where it ended up going, but I would stand by the inclination that I have here.

Further, you know, I will say with respect to virtually all the documents that I reviewed, I don't think they, individually or together, amount to a hill of beans in this case. I don't see how they're going to change the shape

of the world, the shape of the table, the shape of summary judgment, the shape of the trial. And so, you know, I don't think there's a tremendous amount of prejudice here, which really doesn't enter into the analysis necessarily, but I think it's a backdrop here.

But this clearly was in my mind not in anticipation of your litigation. It was in -- it was an attempt to involve the FTC and apparently was successful in some respect. But I would -- my immediate case and just my gut on this is -- this is not part -- you can broadly construe everything you were doing at that time as being in anticipation of litigation. And that's kind of what you're doing with these assertions of privilege, and I just don't believe the work product privilege is as broad as you purport to make it with your invocation.

So I hear what you're saying, but I'm not going to -- I think I'm going to stick with my inclination here. And, you know, I do -- I do -- and I don't have the transcript in front of me even if we have one from the last discussion we had on the record. We may not, actually, because I remember I was at home. But, you know, I think it's a little bit poor form for you to tell me that you didn't address work product at all before -- you told me before I kind of overlooked it the last time. And, you know, then I went back and diligently looked in your briefs, including the briefing on the litigation finance firm, and then have you throw me an uncited case today and say

that really supports your position, I mean, that just -- it doesn't work.

But my ruling is not necessarily on the basis of too late in time. It's on the merits.

Go ahead.

MR. DORRIS: Completely understand, Your Honor. And I apologize, but I did not mean to suggest that you had not addressed work product or that it was not briefed.

I was simply explaining that the reason why this particular case was not cited was that the issue about the government investigation had not been briefed by the other side, that specific issue.

THE COURT: Ah.

MR. DORRIS: I didn't mean to suggest otherwise.

THE COURT: Okay. Okay. Fair enough.

And I understand what you're saying; however, what I would say to that last point -- and then we'll move on to the next document -- is if that was a very solid basis for your assertion of the privilege, I would have expected to see that, whatever the heck the defendant said.

All right. So let's move on to Tab -- so this really applies to Tabs 1, 2, 4, 5, 6, 8, 11, 15, 21, 22, 23, 24, 26, and 27. They're all variations of this same email string.

Let's look at this next document, which is the Gerchen Keller communication with Cooley. And this -- this

actually is something that I think -- I thought the plaintiffs were correct on. You brought to my attention that this had been addressed, including the cases that you had cited.

I was wrong in my initial inclination that communications with the litigation finance firm which I viewed as simply loan communications would not be covered. The case law is in these cases and others that I've read that communications with a firm as part of an effort to obtain financing to fund particular litigation can be considered work product. So I stand corrected on that, and I'm glad I now know that. Maybe it will come up again in some other case.

But -- and they also include the mental impressions of Authenticom's lawyer, broadly speaking. Nothing, nothing -- very high-level stuff. Nothing, again, that I think is earth shattering one way or another, but it is work product. And so the defendants then, CDK and Reynolds, would have to show substantial need for those documents, whether disclosure to Gerchen Keller made it more likely that the information would be disclosed to plaintiffs' adversaries or Authenticom's adversaries, and also that the party is unable, without undue hardship, to obtain the substantial equivalent of these materials by another means.

And I will tell you, without disclosing the work product, that the substantial equivalent of this -- this discuss -- this communication can be gotten in six seconds in

a -- you know, it's not a -- it's not a 50-page litigation memo.

So I look to the defendants to see whether or not I'm missing something here and that there's something else I need to consider before settling on a ruling.

MR. MacDONALD: Your Honor, this is Ross MacDonald of Gibbs & Bruns. Can you hear me?

THE COURT: Yes.

MR. MacDONALD: Okay. Your Honor, based on your description of the documents and -- and your -- your description of what you see in it, the defendants are willing to concede that this is work product and will withdraw their motion to compel as to Tab 3. And we will also do it as to Tab 18, which I think is another communication with Gerchen Keller that seems to fall in the same sort of category.

THE COURT: Yeah, it's the same exact thing. Okay. Great. Thanks, Mr. MacDonald.

Okay. Next, we're at Tab 7. And these are communications from back in January through July of 2016, at least within that time period -- I think maybe there's one in January, one July; there's others at different times -- about the situation involving CDK and Reynolds' charges for access to their DMS systems.

And I've described the emails generally. They don't mention litigation. They -- one of them actually involves just

the FTC asking for contact information for another dealer, to give you the sense of how substantive these things are. And to me, they're in the regular course of business among business people sharing information that is about their business and about, you know, challenges they're facing in their business.

Sure. Was this broadly -- you know, could you say one of the reasons this was being done was people may have been thinking some about litigation? Yes. But I -- this is not in anticipation of litigation or this specific litigation at the time these were made. These are general, you know, information sharing.

It's not just clear to me that these were in anti -- that they should be categorized as being in anticipation of the litigation that we're talking about here.

So, Mr. Dorris or Mr. Ho, you came up on the short end of this stick. Is there anything I'm missing here or what you want me to consider that I haven't referenced?

MR. DORRIS: This is Mr. Dorris.

No, we understand your ruling. There's nothing further that we (inaudible, audio feedback) --

THE COURT: Okay. Yeah. The other thing, in addition to the -- you know, the previous communication was, like, December 2016. This is, you know, beginning a year -- more than a year before the litigation took place.

Okay. Tab 9, this was communications by in-house

counsel at Authenticom to somebody at BMO. I take it that BMO is one of Authenticom's lenders, Mr. Dorris?

MR. DORRIS: Yes, that's correct, Your Honor.

THE COURT: Okay. And, again, you know, the earth-shattering nature of this escapes me. It's mostly informing the lender that Kellogg Huber had agreed to represent Authenticom about four months before the lawsuit was filed.

It includes what I say it includes here without characterizing it any more directly. But I think you could go to the Kellogg Huber at that time website and -- which apparently the in-house counsel did. He copied this stuff verbatim off the website. But it does include a couple of sentences that on a very broad-based basis includes the lawyers' and the law firm's sense of the case, nothing earth shattering. And you could almost -- and nothing very specific, but it certainly is mental impressions.

So I think it's, you know, at least those two lines, you know, but arguably, the whole email is work product, clearly in anticipation of the litigation that happened.

I cannot believe that the defendants have a substantial need for this communication. So I look at the defendants here, Mr. MacDonald, and then I'm -- if I need to characterize this any more, I will.

But, you know, and I recognize, by the way, you guys -- it's real tough to do these on a privilege log basis,

particularly with the privilege log or logs in this case where the descriptions are almost 100 percent unhelpful in terms of what the document actually ends up being. So, you know, I -- you know, I get it.

But given my description, do you want to make a full-court press for this or --

MR. MacDONALD: Your Honor, Ross MacDonald.

Given your description of the documents, defendants are happy to look up Mr. Ho and Mr. Dorris's firm bios on the website. We'll withdraw our claim for this document.

THE COURT: Yeah. And maybe if you look them up, now there's going to be even more stuff there, because this was -- this was back in 2017, so hopefully they haven't been just resting on their laurels with these -- with these wonderful cases, but okay.

And I recognize there is absolutely no way that you could figure out what this document is from a description that says -- let's see, what does it say -- "Confidential communication between the common interest parties reflecting the legal advice and mental impressions of counsel regarding CDK and Reynolds' data access issues for litigation strategy."

You know, I suppose at a high-level basis, those two lines in here communicate mental impressions of lawyers at a very 30,000-foot level. But, you know, I don't blame you for asking for it, but that's what it is.

Okay. Tab 10, yeah, this is one that I had questions about. So, you know, this is a few months before the lawsuit is filed, you know, a couple of communications here between Gilbert Hale and Steve Cottrell. And I think judging from the sense of the -- the email, there were also oral communications between the two.

They -- this appears to be part of Authenticom's attempt or work in developing facts. I don't really know who Gilbert Hale is necessarily, a consultant, a dealer, a former dealer, but he -- and he probably has been deposed in the litigation here.

So, you know, I think -- I think judging by the content of the email, which is long, he's reporting various facts that he has learned or come into -- you know, come to know and definitely is referencing anticipated litigation, which really if this ends up to be this litigation, the question then becomes substantial need and in particular -- and I didn't put this necessarily in my letter -- but whether the parties, CDK and Reynolds, are unable without undue hardship to obtain the substantial equivalent of the material that is in this email.

And, you know, if he's been deposed and he has, you know, hypothetically disclosed pre-litigation conversations with Cottrell, I'm not sure what the -- what the substantial need is for this particular one.

But maybe, Mr. MacDonald, you could address this.

MR. MacDONALD: Yes, Your Honor. Ross MacDonald.

So I -- I think there are two questions here. I'll, first of all, answer your question.

Mr. -- Mr. Hale, as we understand it, operates or operated kind of a competitor data or hostile integrator to Authenticom, so one of Authenticom's competitors that was in roughly the same line of business as Authenticom.

Mr. Hale was not deposed in this litigation. Truth be told, I went back and searched, and Authenticom produced only eight emails with Mr. Hale, so he was not someone who was really initially on our radar at all.

But the first key question we think is whether this was Mr. Hale's work product and whether it's Authenticom's. If it's Authenticom's work product and then it's shared with Mr. Hale, we agree that the relevant question then becomes was there a substantial risk to include Mr. Hale, and do defendants have a substantial need for it?

But if it was -- it's Mr. Hale's mental impression, who is a third party, not a representative of Authenticom, but had been given to Authenticom, we don't think under the case law that's Authenticom's, quote, work product.

THE COURT: Yeah, let me -- sorry, sorry. Let me interrupt you on that one, and maybe we can engage.

I mean, my sense of this email and the other one

is -- the reason I thought it was Authenticom's work product is it appears to be asking on behalf of Authenticom in developing the information that he's developing based upon -- in other words, this is not just unsolicited information. This is part of a -- and I'm going to ask the Authenticom people if this is true -- but my impression of it was that there were -- this was part of more communications between them, not necessarily in writing but orally, and that he was acting, you know, under rule -- you know, the work product rule, Rule 26(b)(3), I think, this was material by or for another party or by or for that other party's representative, including, you know, agents.

And broadly speaking, what I was thinking is that he was doing this work for Authenticom, which then makes it Authenticom's work product.

You know, having said what I'm thinking, I want Authenticom to tell me whether or not I'm wrong, because we would have then a threshold question, but the sense of this was that.

Mr. Dorris?

MR. DORRIS: Yes, this is Mr. Dorris.

And, Your Honor, you're correct. This -- this chain of emails -- the two emails he's referenced are the result of Authenticom seeking from its client facts to develop the litigation and ultimately the complaint that was filed seven months later. And Mr. Hale was providing material in response

to those requests.

And jumping -- jumping ahead, if you'll let me, because I don't believe there's any --

THE COURT: Well --

MR. DORRIS: Oh, go ahead.

THE COURT: -- I don't think I'll -- I don't think I'll let you, because I want Mr. MacDonald to finish his presentation before we go there.

I will say, Mr. MacDonald, there's a line in here -- without disclosing any substance, but there is a line that says, "If I can do anything" -- "Let me know if I can do anything else." So to me that's reflective of an ongoing sense of communications where he's being asked questions, and he's responding. So it makes him more of an agent or representative of Authenticom. So that was my thinking on that, so that's responsive to your first point.

So go on to your next point in terms of why it maybe should be produced.

MR. MacDONALD: Thank you, Your Honor. Ross MacDonald again.

So based on Your Honor's statements, then it does become kind of whether there was a substantial risk of disclosure or whether we have a substantial need for the information that we can't get elsewhere.

As to the former, I appreciate that, you know, these

are just communications between two different entities, but they are competitors. We have not seen any evidence that any of these materials were, you know, produced subject to a nondisclosure agreement or a confidentiality agreement or anything like that, which are the type of things the courts typically look for to see whether, you know, the work product privilege has been waived and whether there is a substantial need of it or not.

Obviously, without kind of knowing the substance of the document, it's difficult for me to say, but based on my high-level understanding of the document, it is -- I think it describes kind of CDK's data access policies and, perhaps, Mr. Hale and Authenticom's method for accessing the CDK DMS and those willing to rely on very pertinent issues in this litigation about that, as Authenticom has claimed, you know, at various times it didn't know its access to CDK's DMS was unauthorized or didn't know or thought that its access to CDK's DMS was legal when CDK claims that it was illegal.

So to the extent there are substantive discussions about how to access CDK's DMS, CDK's blocking measures, how to get around those blocking measures, that would be very relevant to this case and particularly relevant to kind of the summary judgment briefing that's going on now.

THE COURT: Okay. Do you want to address that second point, Mr. Dorris? Because I would say, frankly, a lot of the

information in this email is kind of technical.

MR. DORRIS: Yes, Your Honor. It doesn't relate -- of course, there's no way of knowing this instant document, but what the potential relevance that Mr. Ross has mentioned doesn't exist in this email.

What Mr. Hale is doing and the purpose of this fact gathering was to determine what the data access policies of CDK actually were. And you see reference to communications with CDK here and Mr. Hale reporting back what he was told.

So this is, one, nothing to do with what he believes could be relevant; and two, that shows why there's no substantial need. It's determining what CDK's data access policies are, which are necessarily within their possession. They need only talk to the relevant people at their client to determine those.

THE COURT: Okay. First of all, if you're on a speaker, I'd really appreciate it if you would pick up the phone, because you cut out on -- you know, speakers, obviously, as you know, if you take a little bit of a pause or a breath or something -- wait.

(Discussion off the record.)

THE COURT: So I would ask that, because hopefully our court reporter is getting it, but I'm not. You cut in and out.

And -- and the second -- the second point is, hearing

that, Mr. MacDonald, what's your response on that?

MR. MacDONALD: So our response would be that I would agree that CDK's data access policies are otherwise discoverable. But the relevant issue is -- is what was Authenticom's and what were other, you know, integrators in the industry's understanding of what CDK's data access policies are? Because CDK says our data access policies were X, and Authenticom has claimed, well, we didn't know that or we weren't aware of that or, you know, people weren't aware of that; and therefore, we didn't know our access was unauthorized.

And so even though, you know, the fact that the policies themselves may be, you know, ascertainable from CDK, Authenticom and Authenticom's competitors' awareness of them is very much a live issue in this case.

THE COURT: I need to understand what you just said better.

The way Mr. Dorris characterized this is -- you know, I think what he is saying -- Mr. Dorris, correct me if I'm wrong -- it's an attempt to ascertain what CDK's data access policies are. Is that what you're saying?

MR. DORRIS: Correct. And if you look at the document, I think the best thing -- and, in fact, it's the last paragraph -- what the purpose of what Mr. Hale was doing was, the last paragraph of the first page of the document.

THE COURT: Hold on for one second. The last paragraph of the email you're referring me to?

MR. DORRIS: So the email is two pages.

THE COURT: Yeah.

MR. DORRIS: The first page, the long page, the last paragraph of that page.

THE COURT: Oh, that's it. Okay.

So that says, Mr. MacDonald, simply what Mr. Dorris says, that it's gathering information. I mean, I don't think this is -- I mean, he's already said this, so I'm not disclosing anything -- gathering information regarding CDK's policy about dealers being allowed -- well, about pulling data, dealers -- dealers versus third parties pulling data from CDK's system.

And now that I'm reading the email with Mr. Dorris's description, it is all about what he has learned about what CDK's policies in that regard are. Let me just review this again.

Yes. Okay. So if that's the substance of the email -- I know you referenced this, but I don't -- I'm not looking at realtime. Can you say again why, if it is your position, that that would be relevant? I think you said something like it's relevant what the dealers or what Authenticom or others knew about CDK's policies at a particular point in time?

MR. MacDONALD: Yes, Your Honor. This is Ross MacDonald again.

So, again, I don't have it in front of me, but I think there are a couple of potential relevancies. So the first one is Authenticom has claimed, you know, that it wasn't aware that CDK prohibited its third-party access of its DMS. And this is relevant both to our antitrust defenses and to CDK's counterclaims which they allege, you know, that Authenticom violated the Computer Fraud and Abuse Act or the copyright act or various other acts, the DMCA. Often those turn on kind of whether a third party was authorized to access the system or not authorized to circumvent an access control or not.

And so to the extent this email indicates that either prior to this time or at this time Mr. Cottrell became aware that Authenticom's access was unauthorized by CDK and that Authenticom continued to access CDK's systems, so it has relevance to those claims and defenses.

The other issue -- and, again, I don't know whether this comes up in the letter -- but there has been a dispute over aftermarket market definition in this case between kind of whether a third party like Authenticom pulling data from the DMS is a substitute of a dealer pushing data out of the DMS. And I think there's been a dispute over what -- to what extent CDK allows it or to what extent dealers are able to put data

out of the CDK DMS.

And so to the extent that this shows that dealers can put data out of the CDK DMS, that is also relevant to kind of how the aftermarket is defined.

And I'll also -- I represent Reynolds. So to the extent Ms. Miller, who represents CDK, has anything else to say, I'll let her speak, too.

MS. MILLER: Your Honor, this is Britt Miller.

Mr. MacDonald summarized it quite well.

THE COURT: Well, I'm -- was -- Mr. Dorris or Mr. MacDonald, was Gilbert Hale listed as a 26(a)(1) disclosed witness for Authenticom when you made your 26(a)(1) disclosures?

MR. DORRIS: No, he has not been listed on any initial disclosure. And I think that highlights why there is no need for the information, because if any -- first of all, the relevant thing is whether there was authorization. That's -- that's a legal relevance here. And so what a party understands or doesn't understand is not -- not really addressed to that.

It's what are CDK's policies. And what those policies are are easily determined over why CDK is -- should have access to their client (inaudible, audio feedback) --

THE COURT REPORTER: I'm sorry. I'm sorry. Judge, I'm sorry.

Mr. Dorris, you have to speak up because you're getting garbled a little bit --

THE COURT: Yeah, I can't --

THE COURT REPORTER: -- on my end.

THE COURT: Yeah, I can't hear him either. I can't really hear him either.

MR. DORRIS: Can you hear me better now?

THE COURT: Yes.

MR. DORRIS: Okay. Good.

So the relevant inquiry here that Mr. MacDonald is referencing is whether there -- there was authorization, and that's determined by the policies themselves.

Whether -- what a party understood about those is not as directly probative of that inquiry as to what the policies actually were, which is what CDK has in its possession. There's no need to get that information.

And further, this shows what a third party, Gilbert Hale, who is not listed on any initial disclosure, learned at most of the policies with just -- there's no need for that because he is not listed on -- (inaudible).

THE COURT REPORTER: I'm sorry. You're dropping off again.

THE COURT: Yeah, I get it.

He's not listed on what?

MR. DORRIS: The initial disclosures, Authenticom's

or any other parties' (inaudible).

THE COURT REPORTER: Can't hear.

THE COURT: I'm just reading this again with this information.

(Brief pause.)

THE COURT: Mr. MacDonald or Ms. Miller, there has been discovery in the case, right, about just factually what Authenticom and other dealers did in terms of accessing CDK's system in terms of obtaining data from that system or pushing that data to others? There has been a tremendous amount of testimony about that in this case, right? It's central -- it's been central to the case, right?

MR. MacDONALD: Yes, Your Honor, there has been a reasonable amount of discovery about kind of those issues.

Obviously, there are some disputed issues where we take certain positions and Authenticom takes certain positions on some of the issues. And the Hale emails may shed light on that, but I cannot say there's been no discovery on that issue.

THE COURT: Okay. Here's my call on this, Mr. MacDonald and Mr. Dorris.

I do think it's work product for the reasons that I described. I do think that Mr. Hale was, in effect, acting -- doing this on behalf of Authenticom, so he becomes their agent or representative in that capacity.

I think also, as I'm looking at this and looking at

the rule again, it contains what could be interpreted to be mental impressions, conclusions, or opinions of a representative of Authenticom concerning a matter that then is in the litigation because it discusses, you know, what -- what he has found and what he understands it to be and so forth.

I don't think, based upon the record that's been developed here, I can say that Authenticom has a substantial need for this information, because I think that the subject matter has been discovered probably *ad nauseam* in your case. And, you know, there are probably -- there's probably reams and reams of transcripts and documents, even though probably disputed, about what each side says about what a dealer or Authenticom could or couldn't do in accessing the system but they were prohibited from doing and what -- and what CDK's policies were.

So this -- this to me is an initial piece of sand on the beach with respect to that, but I don't see it being a substantial need. And it probably is the kind of work product document that fits within that, you know, last sentence of the rule where we talk about mental impressions, conclusions, opinions. It's analysis, too. So it's kind of supposed to be highly protected against disclosure.

So for all those reasons, I would say this one falls within the work product, and there's no substantial need for it. But I'm glad we had the opportunity to discuss it.

And I think that probably is going to also -- let's just do the other one, too. That's Tab 25.

MR. MacDONALD: Yeah, Your Honor, Ross MacDonald.

If that is Your Honor's ruling as to Tab 10, we're willing to apply the same ruling to Tab 25, unless you think there's a reason to treat it differently.

THE COURT: Yeah, that's why I wanted to go back and look at it based on what I've now heard.

(Brief pause.)

THE COURT: Yeah, I think it's within this same vein. I just want to -- yeah, and I don't think the opposite is -- I mean, the article -- the publicly available article about MVSC's filing a lawsuit, that's not going to be something you've got substantial need for. And because it's left in this email chain, I would say I'd apply the same ruling to that. Okay.

So that brings us to Tab 12. And as you can see from my description, this basically is an email about who might be interested in -- in a lawsuit against Reynolds & Reynolds and CDK, frankly.

And so I think, based upon identification, for example, of people who they claimed were within a common interest privilege and the discovery in the case, you probably know all those people, but let me see how this is described on the log.

Yeah, I don't know that I would describe it that way, frankly. But, I mean, it is a communication between -- involving lawyer -- or there are communications that are -- I believe they start with the lawyer at Cooley, Schildkraut communications with AutoLoop, Authenticom, and others about people who might be interested in -- in becoming involved in the litigation.

So, you know, it is within that -- within those parameters, it's -- I would say it's work product. I'm not sure why defendants would have a substantial need for that particular information.

They also, by the way, on the privilege log identify everybody to whom the email was sent. That doesn't necessarily identify the people who they say might be interested in being involved in the litigation. But without revealing any secrets, there's no names in that list that I could see that have not been -- that I haven't seen as disclosed beforehand.

Go ahead, Mr. MacDonald.

MR. MacDONALD: Thank you, Your Honor.

Well, I believe you identified what we think are the main issues. The first is kind of is this a document prepared in anticipation of this litigation or was -- as opposed to a general business document or lobbying the government or the Federal Trade Commission?

It -- it sounds like you're ruling that you do

believe that this was created in anticipation of -- of this particular litigation as opposed to lobbying the FTC. But as you previously kind of mentioned in the letter on the *Viamedia* case and the cases it cites, to the extent communications are made with respect to lobbying the government, those are not work product privilege.

THE COURT: Let me -- let me interrupt you there. Sorry, Nancy.

But it specifically references a potential lawsuit. It does not reference FTC stuff.

MR. MacDONALD: Fair enough.

The second point we would raise is kind of a threshold question. It's whose work product is it, and who were the lawyers representing?

Just to remind the Court, Authenticom has not produced any evidence of who the legal representations were. There are no affidavits, no engagement letters. We're relying entirely on counsel's representation of who represented who. And in certain cases, those representations have changed over time. For instance, we're originally told that Davis Polk represented Dominion only, who is one of the vendors on these emails, and later we received a letter saying, well, Authenticom was also considering retaining Davis Polk at the time.

Similarly, Cooley, who this email seems to be about

or reference, you know, we know he represented Dominion. He represented Dominion's witness when that witness was deposed in this litigation and has represented Dominion before the FTC. We're told that he was also representing Authenticom for some period of time.

I'm not -- I'm not casting doubt on counsel's representations. I just -- the only evidence of who represented who and whose work product it is -- is it Authenticom's, is it Dominion's, is it someone else's -- is the documents themselves. So we want to be clear that this is, in fact, Authenticom's work product and not a different party's.

If it is, in fact, Authenticom's work product, I do think sharing it with -- I think there are 10 different people on this email who represent a variety of different businesses in the automotive space, including competitors, software providers. I think Advent is on this email, who is a DMS provider. Some of them have contractual relationships with defendants. Some of them became witnesses, both at the preliminary injunction hearing and in this litigation.

So we do think this substantially increased the likelihood that CDK or Reynolds would get copies of these documents. I appreciate that there was purported common interest, but the Court has overruled that.

We have never seen any confidentiality agreement or nondisclosure agreement produced. One of the parties on these

emails -- let me make sure they're on this one -- is Elead. And Elead is (inaudible, audio feedback).

THE COURT REPORTER: I'm sorry. I'm sorry. I'm sorry. You're breaking up a little bit. Please speak louder.

MR. MacDONALD: Oh, I'm sorry.

One of the -- one of the parties on -- and these arguments really apply to both Tab 12 and Tab 14. One of the parties is, I believe, Elead, which is an entity that was about a year later acquired by CDK. And so CDK theoretically has these documents now but has not reviewed them subject to the privilege rulings in this case. So as a matter of fact, by disclosing these documents to all these parties did increase the likelihood that CDK would get copies of those documents.

And so we think even if the Court were to rule that this was, A, Authenticom's work product, B, for this litigation, we do think that they're -- that sharing it with so many different -- different -- differently situated people did increase its likelihood of disclosure.

THE COURT: Okay. Hold on. I'm making a note here.

MR. MacDONALD: And, Your Honor, just to clarify something I just said, it looks to me that Elead is on Tab 14 but not on Tab 12, but we think the arguments apply generally to both.

THE COURT: Okay. Tab 14 -- I probably should have said this. I realized this when I went through the letter

again.

Tab 14 is the predicate email. There's an email from the Cooley lawyer dated August 5th to the people who you see on Tab 14 and that that email without -- it looks like without all the addressees for some reason is the -- is an email that is also fully in Tab 12. And then there's one more email there from Tony Petruzzelli, so --

MR. MacDONALD: Your Honor, my mistake. It is the same addressees. Elead is on both. I just missed -- I missed that. My apologies.

THE COURT: Okay. Yeah, I guess I would have -- yeah, I see it up there on top there, too, yeah, because they're probably replying to all for all of those people. Okay.

And -- but putting -- I get the argument that it increased the likelihood of disclosure by sending it to all these people. Your substantial need to know which companies, including Authenticom and AutoLoop, were considering litigation against -- were considering a lawsuit against R&R and CDK in August 5th, 2016, what is that?

MR. MacDONALD: Your Honor, without kind of knowing exactly the substance of the emails, if nothing else, it goes to bias.

Authenticom has called some of these people as witnesses both at the preliminary injunction hearing and later

during the MDL and may call some or all of these people at trial. And to the extent we have evidence that they were kind of part of this grouping who had grievances against CDK and Reynolds and that were helping each other, what evidence against CDK and Reynolds to the FTC or otherwise is not good for their reliability as witnesses.

THE COURT: Okay. I'm just pausing here for a second. I want to -- I want to look at something.

(Brief pause.)

THE COURT: Mr. Dorris, directing your attention to Tab 12, I don't think I have the necessary documents in front of me, but the -- without identifying names, the Tony Petruzzelli email identifies two companies.

Were those companies previously identified by Authenticom or AutoLoop as, quote/unquote, common interest parties?

MR. DORRIS: Those two parties are not. I do not believe they appear on any of the communications that are challenged before the Court where there's been an assertion of common interest privilege.

So there are -- there are no communications with those two parties over which we needed to assert the common interest privilege.

THE COURT: And who did Marc -- I don't think Marc Schildkraut represented at this time the -- the representation

from, I think, Mr. MacDonald is that they represented Dominion or did represent Dominion during depositions.

But at this point, who did Cooley represent?

MR. DORRIS: My understanding is at this time he represented Dominion, and that would be Rusty Friddell, the general counsel at Dominion. And the "To" line, the LCI Media is Dominion. And he also represented Authenticom at this time.

THE COURT: And you say he also represented Authenticom? What does that -- what does that mean actually?

MR. DORRIS: He -- they were both his clients.

THE COURT: So that's what you're saying, Mr. MacDonald? We have to take their word for it, right?

MR. MacDONALD: Yes, Your Honor. All -- all we have to go on is what -- is whether kind of whose work product it is and who they're representing is reflected from the documents themselves. No engagement agreements or affidavits have been submitted.

THE COURT: Okay. So I need to look at this more. I'm going to keep this -- I'm going to keep this under advisement right now. I've learned some information here that I didn't know when I was giving you my inclinations in my August 4 letter. One is that two companies that are identified in the email had not previously been identified as part of the so-called common interest group. So that has a bearing on substantial need.

And two, I had not -- I want to think a little bit more, given the breadth of distribution of this email, whether defendants have shown that this kind of communication more broadly among a group of, you know, eight, nine, ten people, whatever, increased the likelihood of disclosure beyond Authenticom. Even if I accept at face value, that initial email comes from an Authenticom lawyer. I know it starts to become difficult in what has been asserted as a common interest and then -- which is what I thought.

So I want to -- I want to -- I want to check that. I want to think about it more, but I now at least understand the issues better, and I'll put that in my ultimate ruling.

Okay. Tab 13, yeah, this to me was an internal attempt at developing facts that on its face the email talks about that in anticipation of this particular litigation.

I don't think disclosing it to Ms. Zimmer made it more likely that it would fall into Authenticom's adversaries' hands because she was working internally at Authenticom at the time.

So my impression is that this is a work product document that would be protected. There's no disclosure outside.

Mr. MacDonald?

MR. MacDONALD: Yes, Your Honor, Ross MacDonald.

Based on Your Honor's description and your ruling,

defendants are willing to also withdraw their request for this document.

THE COURT: Okay. Tab 14, this is -- yeah, I -- this gets wrapped up into 12. It's really the same issue.

MR. DORRIS: Uh-huh. Your Honor, I did want to clarify one thing. It's --

THE COURT: Identify -- identify yourself again. Sorry.

MR. DORRIS: Sorry. This is Dan Dorris.

To clarify one thing, what I meant with those two parties is we had not needed to assert that they were part of the common interest group because there were no communications with them.

I think on the face of the email in Tab 12 and 14, you can see that they would be treated similarly based on their willingness to -- openness to the litigation.

THE COURT: Yeah, but how do you -- if you have not previously identified those two companies as companies that you say were part of the common interest group, which I understand from prior briefing just keeps expanding -- and that was one of the defendants' arguments against it, is that -- is that it was a moving group.

But if Authenticom had not previously identified those two companies as companies within the, quote/unquote, common interest group, whether or not you produced any

communications with them or not, how can you say that the defendants don't have a substantial need for this document which ident -- which provides information that has never been provided before potentially as, you know, going to credibility, if these people end up being a witness someplace and -- or for any other reason, I mean, in terms of the communication?

If they don't -- you know, a lot of the other stuff we've been looking at here, frankly, is information that defendants already have in one form or another or has been gone over in discovery like we talked about with the Gilbert Hale documents.

But this is information you haven't previously disclosed. So why do you say they don't have a substantial need for that information?

MR. DORRIS: The first of the two parties was deposed. If they had a need for this information, they could have asked the question of that party. And I have not read the deposition recently. They may have. I don't know -- I don't know one way or another.

The standard is not whether they need the information or it would be helpful to them. It's whether they can get it through alternative means. And the simple way for them to get it is just to ask the third parties whether they ever considered litigation against CDK and Reynolds.

THE COURT: Yeah. Well, contrary to what you

previously said on the record, I think you should stand corrected, because it looks like I referenced the first company listed there in my opinion dated June 8th, 2020, ECF 1011, quoting from Authenticom's brief in which you identified that company, along with AutoLoop, Dominion, and a bunch of others, as the common interest group.

So now I understand your comment that this had never been -- what you're saying, I guess, is they never produced any documents with that person. But this is one of the companies I think that you at some point added to who was part of the common interest group, or else I would not have picked that up in my order.

MR. DORRIS: I do stand corrected, Your Honor. I apologize that I -- that they were -- yes, apparently my recollection was wrong. There must have been a document sent to them because we identified them as part of the common interest group.

THE COURT: And then with respect to the second company, at least this email does not actually identify that person as part of the common interest group as much as, at least arguably, potentially. But your point on substantial need is? Repeat that again.

MR. DORRIS: It's whether they can get the information through alternative means. And the simple way to get this information is to -- if these parties are important in

this litigation and their bias is important in any way is to ask them, frankly, if they'd ever considered litigation against CDK or Reynolds and to ask -- to follow up on those questions.

THE COURT: So was that other party deposed in this case?

MR. DORRIS: That other party was not -- (inaudible, audio feedback).

THE COURT: Pardon?

MR. DORRIS: They were not deposed.

THE COURT: Yeah. Again, I don't know that this -- that the fate of the third world or the fate of the world depends on this or not, but okay.

I'm going to keep it under -- I need to consider the things that I've just heard. And not deposed and I'd say probably not on your Rule 26(a)(1) list either, right?

MR. DORRIS: I believe those lists are co-extensive, so that would be correct.

THE COURT: Okay.

MR. MacDONALD: Just to clarify, I think your 26(a)(1) list -- and this is Ross MacDonald again -- lists anyone who was subpoenaed, not necessarily anyone who was deposed.

So if they produced documents in this case, they might be on your 26(a)(1) list even though they were not deposed.

MR. DORRIS: That is something --

THE COURT: Do you have an answer, Mr. Dorris?

MR. DORRIS: There -- that is something I have to look into further. I don't know whether this third party was subpoenaed or not.

I can find that quickly, but I -- we can keep going, and I will find that quickly for the Court.

THE COURT: Okay. Okay. All right. Document 16, I don't mean to interrupt your looking, but how the heck is this possibly work product privilege, Mr. Dorris?

MR. DORRIS: My apologies. Tab 13?

THE COURT: 16. And I don't mean to put you on the spot. If you're okay with what I say in here, that's fine. But if you're challenging it, I'd like to know why.

MR. DORRIS: Yes, Your Honor. Why it's work product privilege? I think that the first email, this communication -- described was commissioned -- (inaudible, audio feedback).

THE COURT REPORTER: I'm sorry, Mr. Dorris.

I'm sorry. Mr. Dorris, this is the court reporter. I didn't hear the first part of what you said. It's breaking up a little bit.

MR. DORRIS: My apologies.

The document was commissioned by Authenticom's outside counsel identified as -- on the privilege log, I believe it's Gerry Stegmaier, and this was in the anticipation

of litigation at this time. This is August 2015.

Several months prior to that in the spring of 2015, Reynolds had started to disrupt or increase its disruption of Authenticom's access to Reynolds' DMS, leading to anticipated litigation against Reynolds. And also at this time in April 2015 to the three months before this email, Reynolds had sent a cease and desist letter to Authenticom threatening litigation against them.

So the parties, Reynolds and Authenticom, at this time in August 2015 were in an adversarial position contemplating litigation against one another, and this document was commissioned by Authenticom's outside counsel in relation to that anticipated litigation.

THE COURT: I'm just looking at the document again.

MR. MacDONALD: And, Your Honor, this is Ross MacDonald. I'm happy to respond briefly if you'd like.

THE COURT: I'm just reading the overview of this thing to see whether or not what Mr. Dorris said changes my mind on this.

You can respond, and then I'll rule.

MR. MacDONALD: Yes, Your Honor. My only response would be that it appears that this document was created two years before any litigation was filed. We think it's -- even if it was -- and even if it was created in anticipation of some litigation, it's not clear it's anticipated -- in anticipation

of this litigation. And I don't know whether it mentions additionally suing CDK or suing them for, you know, an alleged conspiracy between Reynolds and CDK, which is the focus of this litigation.

So the fact that Authenticom was obsessed or grumbling that Reynolds had taken certain actions that had as a dispute impacted it negatively does not make it a document created in anticipation of this litigation or because of this litigation, which is the standard in this district.

We also (inaudible, audio feedback) --

THE COURT REPORTER: I'm sorry. Mr. MacDonald -- Mr. MacDonald, you're breaking up on my end. I'm sorry.

MR. MacDONALD: Yes, I'm sorry. I'm sorry.

I was just going to say, in addition to it being well before any litigation was instituted and presumably about a different type of litigation than was ultimately filed, the fact that it is a communication plan we think makes it unlikely to be an attorney's work product or reflecting the mental impressions of an attorney about -- about this. We think it's unlikely to be work product.

THE COURT: Okay. Yeah, I agree. This is just not attorney work product.

In terms of the anticipation of litigation, Mr. Dorris, you know, at page .005 of the document, there's a note which in my mind specifically says in so many words

litigation is not necessarily anticipated at this point. It could happen in the future, but this is -- this is two years before anything happens and many, many -- and at least a year or more before anybody has really taken any steps.

It's a public relations communication plan, and whether or not you got a lawyer from Goodwin Proctor involved or not is -- doesn't change that. And, you know, I guess I can't see how you make a description of this document on your privilege log as, quote, "Confidential communications between common interest parties reflecting the request for legal advice of Stegmaier, Gerry regarding CDK and Reynolds' data access issues."

Somebody has got pat little words that they put in there, but when I read that, I read this document, the description does not operate in the same universe as this document. So it gets produced. It's not work product, and it's not even close.

Tab -- you know what, I want to take -- we've been going longer than I thought. I'm going to take a five-minute break here, and then we'll come back and finish the rest of the documents, and we'll move on.

I also was going to ask the parties at the end of this, by the way -- I'd like the lawyers' view on this -- I know I have under advisement the motion for production of work product material that's being withheld by AutoLoop. And I'm

just -- and I have a box that's very large with two -- two copies of the documents that are being withheld in my office, which I said you should produce.

But I'm just wondering whether the detailed rulings and inclinations that I've given you here have any effect on that and whether I should now delve into all those documents again. Or are there calls that can be made based on these rulings or if you're going to want to challenge them, you know, you're going to reserve every right, and I've got to go through all that?

I'm just wondering whether any of this work, therefore, translates into that or whether we do the same exercise again.

But let's just take five minutes here, and then we'll come back and finish this. Okay? Bye.

MR. MacDONALD: Thank you, Your Honor.

(Recess from 12:00 p.m. to 12:08 p.m.)

THE COURT: Okay. Sorry, everybody. We had what they call technical difficulties, so I'm glad you're all still there. We had to get -- we had to figure out how to get back here. Okay. And Brenda can see on the computer that you're -- everybody is still there.

Nancy, are you there?

THE COURT REPORTER: I am here, Judge. Thank you.

THE COURT: Good. Okay. Great.

Okay. We are now at Tab 17. I don't know -- I mean, I don't know how much to belabor this.

I don't -- for the reasons set forth in my letter, I don't think this is work product. Unlike other emails that we've looked here, the parties didn't even put on there their common interest privilege protection, which I've said didn't apply, but these are similar people who previously had that on there, too. So I don't know.

Mr. Dorris, the ruling -- my inclination was against you here. So do you have anything more you think I should consider here?

MR. DORRIS: Yeah, I'll try and be as brief as possible.

The only thing to consider is that -- (inaudible).

THE COURT REPORTER: I'm sorry --

THE COURT: Hold on. We just cannot hear -- we just can't hear you.

I wonder, frankly, you know, even though we don't have that many of these left, whether you should hang up and dial back in, because you could -- every time you speak, you break up. I mean, we just don't -- we can't hear you.

MR. DORRIS: Is this any better, Your Honor?

THE COURT: It is better. Is that because you're talking into the phone?

MR. DORRIS: No, I turned off the wireless

connection. I switched it to cellular.

The only thing to -- is that Marc Schildkraut, who this email was sent to, was jointly representing the two parties on the email. It was between two parties and their attorneys. There's -- there's no common interest issue.

THE COURT: So even though you describe this as confidential communications between common interest parties requesting the request for legal advice, you're now saying this is actually pure attorney-client privilege? I mean, why do you need --

MR. DORRIS: I don't --

THE COURT: Why is it common interest privilege if each of these companies is a client of the lawyer?

MR. DORRIS: Well, we're here on the work product, and this is work product because they are collecting information for their attorney. They're forwarding factual development of the case to their attorney.

THE COURT: I'm just looking at it again given this gloss on it.

So you would not characterize -- it says: Client 1. Client 1, Authenticom, forwarding information to its lawyer at Cooley and copying Cooley's Client 2 with factual information for use in potential litigation?

MR. DORRIS: Correct.

THE COURT: And then -- and then I guess I'm not sure

how that applies to the underlying emails, which are dealers forwarding a letter from CDK. But I guess that also means if it's a letter from CDK, then CDK has the information.

Okay. So, Mr. MacDonald, change in hypothetical here, I guess, right? This is -- I mean, they call it work product because it's a communication from Client 1 to its lawyer, copied to another client of that lawyer, about sending a communication from CDK that was received by dealers, but they're forwarding it to lawyer in anticipation of potential litigation.

So I'm not sure why they need common interest if both of them have retained a lawyer. So it's an attorney-client privileged potentially document, but they're now saying also work product because they're forwarding information for use in potential litigation.

MR. MacDONALD: Yes, Your Honor. Ross MacDonald -- Ross MacDonald again from Gibbs & Bruns for The Reynolds & Reynolds Company.

So a few things. First I would say that we agree with Your Honor that any kind of underlying emails from the dealer or from CDK or communications with the dealer would not be privileged, and it would not be Authenticom's or Dominion's work product. That would be the extent of the dealer's emails, the dealer's work product.

To the extent there are communications between

Authenticom and Dominion or between one and their lawyer, taking kind of the assertion of representation at -- at face value, it doesn't sound like there's anything on the face of the email that makes clear that these emails were in anticipation of litigation; I suppose, too, in anticipation of lobbying the FTC, which as we've seen a number of these communications are about. And Mr. Schildkraut did represent Dominion in front of the FTC.

But to the extent these are -- this is gathering information to go to the FTC and get the FTC to investigate CDK or Reynolds, that would not be work product privileged.

And it's also not clear to me that even -- you know, I guess we're saying, well, maybe it's attorney-client privileged. You know, there is no an allegation of a joint representation that we've asked -- I believe back in 2019 we asked whether there's a joint representation, and we were told no. So these would be representations of two individual clients, and so there would still be a waiver sharing between them.

I would also point out that, you know, this is seven months, I think, before litigation was -- was eventually filed, which makes me think it might be more likely that these refer to lawsuits (inaudible) rather than, you know, the instant litigation.

MR. DORRIS: Your Honor, this is Dan Dorris.

On that point, I think to clear up the timeline issue, Tab 12 shows the one that was discussed at length about potential plaintiff chose the contemplation of private litigation by -- (inaudible, audio feedback).

THE COURT REPORTER: I'm sorry --

THE COURT: I didn't hear what you said at the end there.

MR. DORRIS: You know, this is October 2016, three months after -- two months after the prior email contemplating private litigation.

THE COURT: Well, to answer the FTC-related issue, this email doesn't reference either litigation or the FTC, but I would note that all of the emails reference with respect to Tab 1 and all the related emails were in December of 2016. And this document here is dated in October of 2016, two months after the email that Mr. Dorris just mentioned or just alluded to, taking the temperature of potential plaintiffs.

But focusing on this particular email, this email chain consists of one, two, three, four -- five emails. The first four of those emails don't involve a lawyer. They're forwarding a letter from CDK (inaudible) that was received by dealers. Ultimately it gets to Michelle Phelps at Authenticom, who forwards it to Steve Cottrell.

So on those, Mr. Dorris, just separating them out, there's no work product there. I mean, there's -- nothing is

being forwarded to any lawyer for anything, and those are just -- those are just common garden variety communications between business people about a letter they got -- some dealers got from CDK.

I don't -- I mean, do you seriously have an argument that any of that is work product? I think what you're saying is forwarding it to the lawyer somehow makes it work product, right?

MR. DORRIS: Yes, the latter. Independently forwarding it to the attorney, I completely agree, it's not work product.

THE COURT: So what you would say then is forwarding that information to the lawyer is -- based on the timing and what was going on at the time, is in anticipation of litigation that Authenticom at least was discussing at that time and was discussing it with Dominion, who is a common client of the lawyer, right?

MR. DORRIS: Correct.

MR. MacDONALD: And, Your Honor, this is Mr. MacDonald again.

We would just say that forwarding otherwise unprivileged documents to a lawyer after four or five emails does not retroactively make the prior email prepared in anticipation of litigation and cloak them in a work product privilege.

THE COURT: Yeah. Okay. Here's -- here's where I am on this.

I think the first four emails are not covered by the work product privilege at all. I think there's a colorable claim here that forwarding the factual information to a lawyer at this particular time, the lawyer who's actually representing the party, copied to another client of that lawyer, arguably is work product. The timing and, you know, who the participants in this are, I mean, I know that this Cooley lawyer was involved to some extent with discussions between Authenticom and Gerchen Keller about potential litigation, so it's in the mix.

So I think simply forwarding the factual information to a lawyer in the context of closer in time to some of these other things where litigation is being contemplated arguably could be work product. If it is work product, it's hard for me to see how -- it has no mental impressions of the lawyer. It just is forwarding this.

I don't know. I think I'm unwilling to -- I don't know -- I don't know how (inaudible) my other dealings have been, but I think my -- I think probably if there are other things in here where factual information is being forwarded to a lawyer, the litigation conceivably is on the horizon and could be considered to be work product.

This is -- I mean, it's pretty much disclosed. The

fact is in here, I guess, because this is -- I'm going to order you to produce the underlying emails and then the letter and the other underlying emails and then forward it to the lawyer, for whatever that's worth.

You know, it's clearly not clearly work product like mental impressions, but it's client forwarding to lawyer factual information for use in potential litigation. I think this is closer to potential litigation than the FTC-related stuff, which clearly was related to the FTC and only the FTC.

I guess my final call on this -- and, again, the fate of the Western world doesn't depend on it since we've already disclosed what's in there probably -- is produce the underlying emails, and you don't have to produce the final email where Cottrell is sending it to Schildkraut and copying it to Dominion. I don't -- I don't know that that matters, but that's my final ruling.

And then I'm doing that, just so you know, Mr. Dorris, so you don't become emboldened, just because I don't want to step across the line in saying material sent to a lawyer that arguably is in anticipation of litigation can't be privileged. But this one -- this one pretty much is one end of that spectrum.

Okay. Let's try and wrap this up.

Tab 18, we dealt with this before. This is Schildkraut's communications with Gerchen Keller, the

litigation finance firm. I think defendants may have withdrawn this along with the other one, right, Mr. MacDonald?

MR. MacDONALD: Yes, we did, Your Honor.

THE COURT: And I will say to the extent that this question about Cooley's representation of Authenticom versus Dominion or somebody else, I mean, Schildkraut clearly is involved in discussions with a firm that is being considered as a potential source of funds for actual litigation at this time and was communicating mental impressions -- this one clearly is mental impressions of damage theory but, again, Hornbook law. But I -- you know, that puts him within the mix of at least the relationship that the plaintiff is saying it has with Cooley.

All right. Tab 19, Mr. Dorris, how is this -- how is this subject to work product privilege?

MR. DORRIS: We have -- this is Dan Dorris. We have nothing further to add, so we understand the Court's -- the Court's ruling.

THE COURT: Okay. I'm going to say produce it.

Tab 20, this is after Kellogg -- Kellogg Huber is retained or is in -- maybe not clearly in the process of being retained. Maybe they've actually been retained, too.

MR. MacDONALD: Your Honor, this is Ross MacDonald. I'll just cut you short there.

Based on Your Honor's description of the document, Kellogg Hansen or Kellogg Huber had been retained at that

point. We'll withdraw our claim as to Tab 20.

THE COURT: Okay. Thanks.

Tab 25, this is -- we dealt with this before. This is the other half of the -- or the other Gilbert Hale communication. So my ruling with respect to that stands, too.

Tab 28, so I guess I present -- I posed a question, Mr. Dorris, to Authenticom in my letter asking whether the draft legal documents that outside counsel sent to Mr. Cottrell here -- I guess you're also going to say they're forwarded actually to a co-client of Cooley's, but were these in anticipation of litigation?

MR. DORRIS: Yes, Your Honor, these, well, frankly, are not relevant to litigation so probably should not have been on the privileged log, but they are the engagement letter and agreement between Authenticom and Marc Schildkraut. And to be clear, these are the formal written engagements, but as we represented, he was rep -- he was actually representing and acting as Authenticom's attorney prior to this case.

THE COURT: And were those -- just to put a finer point on it or put you on the spot, were these written engagement letters for actual -- and I didn't disclose what was in the -- I don't think in the -- in my summary, so you did, which is fine. But it is -- the caption is "Draft Engagement Letter and Confidentiality Agreement." These were in anticipation of court litigation as opposed to FTC

representation?

MR. DORRIS: They would have encompassed both. They were representing Authenticom for all legal matters.

THE COURT: But those legal matters, just to be clear, would have anticipated potential litigation?

MR. DORRIS: Would have -- would have included the private litigation, yes.

THE COURT: Okay. Based on that, Mr. MacDonald?

MR. MacDONALD: Yes, Your Honor. Ross MacDonald for defendants and for Reynolds.

If this is a discussion of Mr. Schildkraut's engagement letter related to filing private litigation against CDK and Reynolds, then we would concede that that is work product privilege and probably did not substantially increase its likelihood of disclosure to defendants.

To the extent the draft labeled documents related -- or were related to Dominion's representation or to representation before the FTC, we do not think those are work product privileged. And we actually don't have the documents in front of us, and so we'll just have to rely on counsel's representations.

THE COURT: Based on the face of them, they appear to be -- because the first it's -- the first email is Schildkraut to Cottrell, and the context of the second email makes clear that it's Authenticom's engagement of Cooley, and then he's

sharing it with either -- I don't think -- for the reasons I stated in my letter, I don't think sharing it with Dominion under these circumstances would necessarily waive the work product privilege. And that's strengthened by some of what Mr. Dorris said today. So -- and I would say that the underlying documents are not included. It's just a cover email, so all you would get is here it is. And I'm not sure it's going to make a hill of beans difference. But I think it is -- if it's as Mr. Dorris portrays, forwarding the formal written letter of the engagement between Cooley and Authenticom, I think it's privileged.

MR. DORRIS: Thank you, Your Honor.

THE COURT: The final document 29 is the same thing that we looked at before, I think, right, which is this strategic communication plan years before the litigation shoe drops. It's essentially the same plan, I think.

And for the same reasons, my ruling is the same. It has to be produced.

So I have one open issue.

MR. DORRIS: To answer the question earlier about whether the other party in that email was a -- on the confidential disclosures, they were subpoena recipients. So, yes, they are on Authenticom's initial disclosures, but they were not deposed.

THE COURT: Okay. You have to say this again. All

right? Because, again, you broke off, and our court reporter is being too nice. But could you say again what -- you're talking about the second party in an email that I was going back to, right? The second company in the email that I was going back to, right?

MR. DORRIS: Correct. The open question was whether they were on the initial disclosures. And the initial disclosures include all subpoena recipients, and that party was subpoenaed in the litigation.

THE COURT: So you broke up again at the end. So you say that party was what?

MR. DORRIS: Subpoenaed in the litigation.

MR. MacDONALD: And, Your Honor, Ross MacDonald again.

Just so that you're aware, I don't have the time to do an accurate count, but I think there was something like, you know, 60 or 70 or 80 subpoena recipients in this litigation.

So to the extent the fact that they're on the disclosures is supposed to put us on notice to depose them and ask them whether they're in a common interest group or something like that, that would have been difficult for us to be able to figure out.

THE COURT: To say the least. Okay. Hold on for one second. I think I'd like to just resolve this right now. So I'm going back to those documents rather than taking anything

under advisement, and then we can talk about when the documents are going to be produced. So just hold on for one second.

MR. DORRIS: Your Honor --

THE COURT: We're looking at Tabs 12 and 13, right? That's what we're talking about? No, I mean -- I'm sorry, 12 and 14.

MR. DORRIS: 14.

(Brief pause.)

THE COURT: So these Tabs 12 and 14 are communications involving people who have been called the common interest group. The substance is -- and including a lawyer who we know who is engaged, been engaged, representing at least Authenticom, about what companies might be interested in a potential lawsuit, which is a word that's used in these emails, against CDK and R&R.

So it references potential litigation even though it takes months later for it to be -- litigation to actually happen. So I have concluded in my preliminary inclinations that the information was work product -- that this was a work product communication.

And the question is whether the defendants have substantial need for it or communicating the information in this way substantially increased the likelihood that the information could be shared with Authenticom's adversaries, including CDK and R&R?

I think Mr. -- Mr. MacDonald reframed these issues as, one, whose communication is it? Is it Authenticom's? In which case, it could be Authenticom's work product. Or is it someone else's communication?

The first communication in this string which is Tab 14 is from a lawyer for Authenticom or a lawyer who has been represented as a lawyer from Authenticom to Authenticom and others -- to Authenticom, I think Dominion or what became Dominion and others. So I think Tab 14 checks the box of a communication by or on behalf of Authenticom.

The main email in 20 -- in Tab 13 is from AutoLoop and really from, I think, probably the personal email from Tony Petruzzelli to Authenticom and others.

So if there's no common interest privilege, Mr. Dorris, now that I'm dissecting this, how did the email from Tony Petruzzelli to that group become Authenticom's work product?

MR. DORRIS: The email -- both emails are Authenticom's work because they are collecting information for the attorneys representing -- I mean, so the first email is the actual impressions of Authenticom's attorney, and the second email is providing information to that attorney. So he's representing Authenticom.

THE COURT: Say that again. You say the Petruzzelli email is Authenticom's work product because he's providing

information to Authenticom's counsel who is using that information to gather inform -- as part of what he's gathering for potential litigation?

MR. DORRIS: Correct.

THE COURT: Can you put me on mute for a second?

THE CLERK: Sure, Judge.

(Brief pause.)

THE COURT: Okay, people, I have my final answer.

Tab 14 is protected as work product and does not get produced. It's communication by Schildkraut to client Authenticom about a -- clearly about a potential lawsuit, because that's what it says. And so any context I think is this potential lawsuit is the way to interpret that. It doesn't talk about the FTC at all. It's talking about this -- it's talking about any lawsuit and trying to gather information about people who might be interested in a potential lawsuit. So that's work product.

I don't think copying it to the rest of these people who were, you know, anticipated potentially to be plaintiffs about this common interest group, I don't think it substantially increased the likelihood that it would be disclosed to Authenticom's adversaries in the way it was being sent.

And I also don't think defendants have a substantial need for it, because all the people who are identified there

were previously identified as common interest parties, so they know who those people are. They don't need this document to say that.

However, Tab 12, the top part of it, which is Petruzzelli's email to Schildkraut and everybody else, including Authenticom, which is really in response to Schildkraut's email, I don't see -- I don't buy the argument that Petruzzelli's email is Authenticom's work product simply because he's forwarding it to a lawyer who is representing Authenticom.

So Petruzzelli's email in Tab 12 needs to be produced, but you can redact what is under the Yahoo! email address there. Basically his signature and Yahoo! email, I would redact essentially everything that's under there, which is a -- a reproduction of what is Tab 14 of the Schildkraut email.

So Tab 14 is work product, does not have to be produced. There's no substantial need for it, and it didn't increase the likelihood of disclosure. But Tab 12 -- 12, the Petruzzelli email has to be produced down to where Schildkraut's email begins where it says, "On Friday, August 5th, Schildkraut, Marc wrote." From there on down can be redacted from this, but the top part of it has to be produced. Again, whether that affects the fate of this litigation, I don't think so, but that's my ruling based on the law. So

that's where I am.

Okay. I want to get these documents -- the documents that are going to be produced as soon as possible. So I know it's Friday, and now it's Friday afternoon. I recognize that. But I think the defendants are entitled to these, so you can turn them around. These have obviously been segregated because they've been put in binders several different times. So I would think plaintiffs could get this -- plaintiff can get this stuff produced to the defendants by Wednesday. Am I wrong?

MR. DORRIS: No, Your Honor. In terms of producing the documents, that's no problem. We do need to consult with the client to see whether they have any desire to appeal the ruling. I don't -- I hope we can resolve that quickly, but if there's no appeal, the process of producing the documents (inaudible, audio feedback).

THE COURT: Okay. Well, I'm going to order that they be produced by --

THE COURT REPORTER: I'm sorry. Judge, Judge, I'm sorry.

THE COURT: I'm going to order that they --

THE COURT REPORTER: Judge, I'm sorry. I didn't hear the end of what Mr. Dorris said. He completely -- I completely lost him.

THE COURT: Yeah, I did, too. I just -- I'm sorry. I did, too, but I didn't think it was -- okay.

Okay. Go ahead. Mr. Dorris.

MR. DORRIS: All I said was the process of producing them, we can do that as quickly as the Court orders. The only issue is whether there's any desire from the client to appeal the ruling.

THE COURT: Okay. So here's what I would say on that. I'm going to put in my order today that we had this hearing. The Court ruled on the record with respect to the work product documents or the documents over which Authenticom has asserted an attorney-client privilege. The Court ordered some of those documents to be produced.

A written order will follow, but you already have, for purposes of discussion with your client, the substance of that written order in my letter.

I'm going to say, the documents shall be produced by Wednesday, whatever date that is. And I'm not going to put this in the order, but I'm saying to you, obviously, if you are -- you know, that's a shorter period of time than you have to appeal under the rules and the statute, and I'm not trying to shortcut that process. So if you need more time, you can file a -- either a quick motion or get a stipulation from the other side, and I would -- I would stay the production until the full 14 days.

But if you don't need that time, then you ought to get them produced sooner. But if you do need the time or a

larger portion of the time than I'm giving you, I'm not going to override -- I'm not going to prevent you from appealing and being able to present this to Judge Dow. But I just think if you're not going to do it, then you ought to produce them. And if you need more time, we'll put it on the record, and you'll get the more time. Is that fair?

MR. DORRIS: Understood, Your Honor. Yes, that works for us.

THE COURT: And then normally what I -- you know, a lot of times what I'll do is say produce them in 15 days so you get the full 14 days. But because this has been pending for so long and been kicking around so long and we've kicked the heck out of it so long, I just -- I'd rather do it that way. But this is by no means to preclude you from putting the issue in front of Judge Dow. And if you're going to do that, then you won't have to produce them until he rules, but okay.

What about --

MR. MacDONALD: Your Honor?

THE COURT: Yeah.

MR. MacDONALD: This is Ross MacDonald. Real quickly. And I hate to prolong this any further.

There is one document that appears to have slipped through the cracks. It is a document Bates labeled SIS_DMS_0018107. It was a document produced pursuant to a subpoena by a third party, Superior Integrated Solutions, that

was at one point part of the alleged common interest group.

Authenticom then snapped back that document. It was initially submitted *in camera* to the Court under the in -- in the initial tranche of challenged documents back in July of 2019. It appears -- it appears to have, for whatever reason, not been resubmitted in the most recent binder.

I don't need you to make a ruling on this call, but I just wanted to make you aware that there is one document in which there is still a pending work product privilege fight. I think the issues are going to be the same sort of issues you've seen with respect to these other documents and hope -- either you can let us know whether you need a new copy -- or you can let Authenticom know whether you need a new copy of that document or whether you still have it from July 2019.

THE COURT: Well, I'm wondering why that document isn't in the binder of my 29 documents here. Mr. Dorris?

MR. DORRIS: Yes, Your Honor. The document was not on the list of challenged documents in the initial motion to compel, which is why it doesn't appear. It's not the subject of the motion before the Court.

Understanding that the -- that the defendants may wish to pursue the challenge, I think the most efficient way to resolve that is it is currently one of the documents at issue in the AutoLoop motion, so the Court will be able to address it there.

THE COURT: I'm not sure that satisfies.

Could you give me the Bates number of that again, Mr. MacDonald?

MR. MacDONALD: Yeah. It is SIS_DMS_0018107. And I can provide a little bit more color on this document.

SIS produced this document. It was marked at a deposition of an SIS witness. He testified about it.

After the initial motion to compel was filed, Authenticom snapped it back. And so then we -- we raised it on -- in our reply brief that, hey, this document that wasn't asserted -- there wasn't an asserted privilege on when we filed our motion, now you're asserting a privilege on. And so we raised it in our reply brief.

And so although it wasn't mentioned in the initial motion to compel, it was at issue, and Authenticom was aware it was issued because they submitted it *in camera* with the initial tranche of privileged documents back in July of 2019.

THE COURT: And I have your -- I have your reply brief in front of me. Where in the reply brief was it referenced?

MR. MacDONALD: So it starts being referenced at the top of page 7. It says, "For instance, SIS produced." And this is -- I'm looking at docket 585.

THE COURT: Right. Page 7?

MR. MacDONALD: Yes.

(Brief pause.)

THE COURT: I just read the pages of your reply brief that relate to this.

All right. Okay. And before I -- I don't know that there's any easy way to do this here, but Mr. Dorris says this is part of your AutoLoop work product, too.

Before we broke, I asked whether I should review all the documents that have been submitted by AutoLoop in the companion exercise to this now or whether any of the rulings that I've made here or the guidance I gave in my rulings, including my letter, would obviate the need to review some, probably not all, of those documents.

What -- I don't know if you've had a chance to confer with your respective constituencies, but what's the -- what do the parties think about that?

MS. MILLER: Your Honor, this is Britt Miller on behalf of CDK.

Since that motion was brought by us, the short answer is I don't have all 123 of the AutoLoop documents at issue in front of me, simply because I didn't anticipate them being raised on today's call. So I don't know how many of them overlap.

I will say we filed our response on that -- on those issues yesterday, and they broadly fall into two categories. The first tranche of them relate to -- similar to the document

we just discussed, they relate to AutoLoop's third-party communications with SIS and others from the 2000 -- from 2013 and 2014, so years well in advance of the instant litigation.

The last -- the second tranche of them comprise third-party communications with various members of the common interest group that Your Honor said didn't exist from 2016 and 2017. And based on -- on the content of those documents, we don't believe those are protected work product either.

So it may be that some of the guidance Your Honor has provided today may be instructive. But absent a representation from Mr. Dorris that they are going to produce in response to what Your Honor has said, I believe they are all still live issues before Your Honor.

THE COURT: Okay. Thank you, Ms. Miller.

So I guess, Mr. Dorris, as the holder and party that is asserting the privilege, I guess it really is more to you as to whether, given these rulings, there are any documents that are being withheld as part of the AutoLoop contested situation there, whether any of these rulings affect that.

And I'm not -- and I'm not trying to put you on the spot here. This is an Authenticom hearing, not an AutoLoop hearing, where you represent both.

I suppose in your reply -- in your -- I think you have one more brief coming, right?

MR. DORRIS: Yes, Your Honor. The -- I think the

most I can say is there are some documents -- and I don't know how many -- that I believe are complete duplicates of ones the Court has ruled on here and I expect, subject to the Court's ruling, would apply equally to those documents.

The only issue is whether a client wants to appeal those rulings, but we would -- we would accept that the Court's ruling on the identical documents applies in both cases.

THE COURT: So maybe -- maybe -- oh, go ahead. I'm sorry.

MS. MILLER: Your Honor, I'm sorry, this is Britt Miller. I was going to say -- again for CDK Global.

It's entirely possible -- and, again, I don't have the AutoLoop one sitting in front of me -- that there are duplicates. I think we would have to look to see whether or not the same documents -- because obviously the claim that is being made in today's motion is whether or not it is work product of Authenticom. And the ones that are in AutoLoop are whether or not they constitute work product. These same documents apparently also constitute work product for AutoLoop.

So we'd have to address whether or not that, in fact, the rulings are dead on based on the statements Your Honor has made. I just simply can't make that determination as I sit here.

THE COURT: Yeah, I hear you. And I think in the first instance, what I was going to suggest -- and I think

we're probably stepping on Mr. Dorris's second point that he was going to make -- but I suppose one thing I'd like to hear from AutoLoop in their reply brief is just an inventory of documents that are the same and as to which either understands that the Court's ruling would apply to those, with the nuance that you've just raised, which is, you know, if it's Authenticom's work product, is it also AutoLoop's? So we've got to make that determination.

He would say it is because they still stand on the common interest, I guess. But perhaps plaintiffs can -- plaintiff AutoLoop can give us at least some guidance in what even AutoLoop would say I've actually ruled on already, so that I don't have to rule on it again, subject to AutoLoop's right to appeal any of the rulings I've made, I understand that, but rather than me having to go through these and figure out whether or not you would agree that it's the same issue.

But go ahead, Mr. Dorris. You had a second point I think you were going to make?

MR. DORRIS: And, first, yes, we will attempt to make it as simple as possible to the Court in our reply brief.

The second point was, depending on when this -- when or if this Court is -- or when we review the transcript, makes a written ruling, I could foresee some of the written rulings affecting the documents in AutoLoop. It's just hard to know at this time and probably is not going to be possible by the time

the reply brief is due.

I believe that there are some overlapping legal issues that would affect the analysis for even not identical documents in the AutoLoop case.

THE COURT: Well, one, if you're going to order the transcript, I'm sure our court reporter will get it to you as soon as possible.

Two, I would anticipate that my written ruling is going to come Monday or Tuesday-ish. I'm not sure it's going to come today-ish. My written ruling, though, is going to, in large part, parallel what you have in my letter except to the point that additional reasons were given today with respect to certain documents. But you can expect that my written ruling is going to look very much the same as what is in my letter except instead of my saying, "The Court is inclined towards" something, you know, the Court's ruling -- I'm going to rule on this. And except to the extent that I've said I've got questions, I'll take that out, and I may insert things. But I think the written ruling is going to look very, very similar to the 7-page letter that you already have as updated by whatever we talked about here. And I recognize you'd like to see the transcript for that purpose.

Two, I know -- and I'm -- you know, I don't -- I take responsibility for how long a lot of these issues have been pending. As we've talked about before, I think the parties

need to take some responsibility for how they were teed up, but, nevertheless, I share in some of that.

If you needed more time -- if you needed more time to file your reply in order to let me know where things stand, I'm not -- I'm not opposed to that. But if -- if it's not going to matter because the Court is going to have to look at documents in the 123 documents with a different filter -- for example, I'm going to have to look at them to see whether or not it's AutoLoop's privilege as opposed to someone else's -- if in the end what I'm going to hear is pretty much you got to review those and rule on them, then you could file your reply, and I'll get you a ruling on the 123 documents when I get you a ruling on them.

MR. DORRIS: Understood, Your Honor. And that's -- how we can simplify this is going to take some -- a day, a couple days for us to go back and look at the documents in light of what the Court has held.

If we think we can simplify the process by taking several more days with our reply brief to apply the Court's rulings to those documents, we will try and do that with the defendants and submit a new date for the reply brief, if that will be helpful to the Court.

THE COURT: Okay. Currently your reply brief is due when?

MR. DORRIS: I believe it is next Thursday, August

20th.

THE COURT: Okay. Well, I'll leave you to your devices. You'll caucus internally; you'll talk to the defendants, potentially. And if you need more time, fine. If you don't need more time, fine. If you can shed any helpful light on what I have to decide in your reply, fine.

If in doing so the defendants need a surreply, I would consider that, too. So let's let that process go.

Back to the SIS document. I know, Mr. MacDonald, you're raising it, and you're asking for a ruling on it. And I don't really think I can give you a ruling now. I have to sort through in my mind what the heck that means.

It sounds like it will be front and center in the AutoLoop aspect of the work product wherever it sits with respect to the Authenticom aspect of it. And I, frankly, can't parse through how that fits right now where the document that was raised in the reply was not submitted to me. Well, I mean, I'm not -- I mean, I understand why you're raised -- raising it in the reply. It actually sounds like it hap -- it came up later in the process. So, I mean, I'm not -- I'm not being critical here, but I don't think I can do anything about it now.

If there's something you feel I can and should be doing about it, you'll have to raise it to me in some way and tee it up. I mean, I see in the reply you say the reason it

wasn't raised in the initial motion is because the document was not discovered until after you filed your motion back in 2019. So I get it, but I'm not sure I can do anything here.

You were raising it for informational purposes and so it's not a surprise later, but you're not saying I can do something now, right?

MR. MacDONALD: Well, Your Honor, in our reply, we tried to incorporate it into the original motion. As Your Honor said, you are correct, it was not clawed back until after we had already filed our original motion.

And Authenticom did submit a copy of that document *in camera* to Your Honor as part of the initial tranche of documents to review back in 2019 -- July of 2019. So I think Authenticom at least at one point in time agreed that it was subject to an open dispute between the parties.

THE COURT: Okay.

MR. MacDONALD: That being said, if that identical document is going to come up in the AutoLoop review and Your Honor feels that that's the easiest way to evaluate whether or not it's privileged, we don't have a complaint about that.

THE COURT: Okay. I'm sorry. I had forgotten you said -- so that SIS document came to me in July of 2019 in a binder of documents submitted by Authenticom?

MR. MacDONALD: Yes, Your Honor. As you might recall, after the initial privilege motions and response and

replies were submitted, you asked the parties to each identify 10 examples of each type of privilege and for the parties to submit those documents to the Court. And that was one of -- one of either defendants' or plaintiffs' 10 selections for a certain kind of documents. So at one point in time, it was submitted to you.

THE COURT: I got it. I got it. Okay.

Yeah, I mean, I've learned that that was not exactly the best way to do this, so -- but sometimes you learn things --

MS. MILLER: And, Your Honor --

THE COURT: -- okay.

MS. MILLER: Apologies, Your Honor. This is Britt Miller again.

I will simply say I know there are quite a number of SIS documents at issue in the AutoLoop briefing. Again, as I sit here, as I don't have that AutoLoop binder in front of me, I can't say for certain that this exact one is one of those 51, but perhaps Mr. Dorris can clarify.

MR. DORRIS: I likewise don't have the brief in front of me (inaudible, audio feedback.)

THE COURT REPORTER: I'm sorry. Mr. Dorris, Mr. Dorris, Mr. Dorris, I cannot hear you. I cannot hear you at all. This is the court reporter.

MR. DORRIS: I apologize.

THE COURT REPORTER: I can't hear you at all.

MR. DORRIS: I don't have the briefing in front of me. I believe that the document has been submitted. I'm not -- I don't believe it is in the binder of documents. It was submitted as an extra document *in camera* and identified in briefing.

So we'll make this clear -- short story, we'll make this clear in our reply brief so the Court is aware of where this document is and can rule on it.

MS. MILLER: And, Your Honor, one other brief note for the record. I appreciate that -- that Your Honor has -- has said that in light of the time we are dealing with and whether or not Authenticom or AutoLoop needs additional time on its reply and the possibility of CDK being given an opportunity for a surreply, I will simply note for the record that, as Your Honor is likely aware, we -- the parties are in the midst of briefing our respective summary judgment motions. The last of those briefs is currently due on August 28th, so just a few weeks from now.

I appreciate Your Honor has not looked at the documents that are in the AutoLoop binders, but there are motions for summary judgment up on issues obviously that relate to the Loop case. And so we'll simply note that the fact that we don't have or won't -- likely won't have those documents before the 28th, we'd like to obviously reserve our rights that

if those documents are ultimately produced, we would have the ability to supplement the summary judgment record as appropriate.

THE COURT: Yes, and I hear you on this. I'm cognizant of the timing. I'm cognizant of the summary judgment briefing going on, and I'm cognizant of, you know, what impact this could have -- you know, my rulings could have on that or documents potentially could have.

I have to honestly say to you -- and, you know, maybe -- maybe I'm wrong, and maybe you'll see when you get the documents that I'm ordering produced here -- you know, honest to God, I can't see how any of these documents have much, if any, effect on the issues being briefed in summary judgment, the ultimate merits of the case, the trial of the case.

I understand in a perfect world everybody would have wanted to get all responsive documents early in the case before deps and all the rest so the parties -- and I would feel the same way if I was representing a party here. You know, you don't have all the information, and you don't know what you don't know.

But, you know, honest to God, I really don't -- including the last document we talked about here, which identifies two companies who potentially were thinking about being involved in litigation, one of whom was deposed, I guess one of whom wasn't, and when one was deposed, I think

defendants probably needed the identity of who that was as part of a, quote/unquote, common interest, but I don't know that that to be true because the common interest is a moving target. So I get that.

But I hear you, Ms. Miller, and I -- I think the only saving grace is I'm not sure any -- the fate of this case is going to rely on the documents that are being produced or not being produced as a part of this process. But I get it, and I'm sympathetic to it. That's why I spent a lot of time today and why I put what I put into writing and -- but I understand it would have helped everybody if the decision came earlier.

Again, it would help me if these issues were teed up better, too, so -- but I'm not trying to escape whatever responsibility I have on it.

MS. MILLER: Your Honor, I'm sorry. I was not being critical of Your Honor's efforts by any stretch of the imagination. It was simply to note for the record that, you know, whatever time this takes for the Court to work through -- and we appreciate that Your Honor has more than one case on his docket -- that we're simply noting for the record that to the extent the documents that Your Honor has not had a chance to look at through the AutoLoop process or these other documents that they are ultimately appealed by Authenticom, that to the extent some of them by some chance, in fact, are relevant to the issues that we're just simply asking -- noting for Your

Honor that we're reserving the right to possibly introduce additional information after the 28th.

THE COURT: All right. So noted on the record. I got it. And I'm -- I'm sorry if I'm appearing offended. I didn't think you were criticizing me. I really didn't. It was more me criticizing me, which -- you know, which I can do on a regular basis. But I get it, and I get where you're coming from.

You know, I -- obviously I'll look at this SIS document as part of the AutoLoop thing. I really don't know where I come out -- you know, I still have that stuff that was submitted back in July 2019 on the, you know, 10 documents. I could go back and look at that, too.

It is surprising to me, I guess, that in the binder of materials that were submitted to me labeled "Plaintiff Authenticom, Inc.'s Documents Submitted for *In Camera* Review Pursuant to June 25, 2020 Order," which was my 1026 -- ECF 1026, I guess it's -- I guess it's surprising to me that this particular document didn't make it into this binder, given that the defendants raised it in their reply, given that it was one of the original documents that was submitted by someone in July of 2019, and given that it would be a document over which Authenticom was asserting a work product privilege.

What -- what the consequence is of that or what the significance of it is, I don't know. My order of June 25th

said -- which was after plaintiffs filed a motion to reconsider in which you raised the work product issue, among others -- you know, you were supposed to deliver to me on July 1st, which you did, or the 2nd or whenever you did it -- that the documents discussed on the record that are being withheld from production based upon the work product doctrine. And so if this is a document that was being withheld from production on the work product doctrine, I'm not actually -- I'm not actually sure why it's not in that binder, given that I'm sure this binder also contains, Mr. Dorris, other documents that were submitted on July -- in July 2019 as part of the selections, or maybe that's an incorrect assumption?

MR. DORRIS: Your Honor, and how -- our apologies if we misinterpreted the Court's order, but what we did was when CDK -- when Reynolds filed its motion to compel, it included two spreadsheets specifically identifying which documents to challenge.

We went back to those spreadsheets. We looked at the ones where work product was still an outstanding issue, and then we submitted the documents that CDK -- that CDK and Reynolds had specifically challenged and where work product was still an issue. Because this document was raised the first time in a reply brief, it was not on the initial spreadsheet challenge documents.

There was, I believe, kind of a suggestion that

there's been some kind of intent to hide this document. That couldn't be further from the truth. Authenticom voluntarily submitted to this Court *in camera* because it supports our assertions of privilege. We submitted to the Court for that reason two or three separate times. There's really nothing to hide here.

So that's -- so that's why it wasn't in the Court's binder. It's because it wasn't challenged by CDK and Reynolds.

THE COURT: Okay. I understand. And this is the SIS company that I referenced in one or more opinions that was supposedly part of the asserted common interest group that Authenticom or AutoLoop or both threatened to sue as being part of the conspiracy, right?

MR. DORRIS: Yes. And there's some confusion on that. The defendants have said that several times in their brief. And the only commonality is the attorneys. The party that threatened to sue SIS is MVSC, which was never claimed to be a party of the common interest agreement.

So that threatened suit is completely irrelevant to the existence or anything to do with the common interest agreement because the parties have threatened to sue. MVSC was not part of the common interest group.

THE COURT: Okay.

MR. MacDONALD: And, Your Honor, this is Ross MacDonald.

I don't know whether you want back and forth on this.

THE COURT REPORTER: I'm sorry. I can't hear you, Mr. MacDonald.

MR. MacDONALD: Oh, I'm sorry. This -- Your Honor, this is Ross MacDonald on behalf of Reynolds.

The factual background of -- yes, that SIS is the company that you reference in some of your orders. They were a threatened co-conspirator by plaintiff MVSC, who is one of the other plaintiffs in this MDL. It's the same alleged conspiracy or -- but they were not alleged to be part of the common interest group. MVSC was -- (inaudible, audio feedback).

THE COURT REPORTER: I'm sorry. I'm sorry. One more time. I didn't hear what you said after "common interest group."

MR. MacDONALD: Yes, I guess I'll just repeat it.

SIS is the company that is referenced in the Judge's prior order. Superior Integrated Solutions is their name. They are a competitive data integrator or hostile integrator to Authenticom.

SIS was at one time a threatened defendant in a lawsuit -- in the lawsuit by MVSC, the Motor Vehicle Software Corporation, which is one of the other plaintiffs in this MDL that alleges an anticompetitive conspiracy by CDK and Reynolds. In the initial draft of their complaint, they allege that SIS is part of this conspiracy.

Mr. Dorris is correct, however, that MVSC itself is not part of the common interest group. We only point out SIS as a potential defendant to show that it is unlikely that they are in a -- in a common interest group to sue someone over a conspiracy when someone else represented by the same lawyers allege they were part of that very conspiracy.

And in any event, I just want to point out we were not intending to accuse anyone of bad faith or of intentionally hiding the SIS documents. We just noticed that it slipped through the cracks and wanted to get it on the Court's radar.

We're happy to -- you know, whether the Court wants to look up the old -- you know, deal with it in the context of AutoLoop, that's fine. Whether the Court wants to go find it from the July 2019 submissions, that's fine. Whether the Court wants Authenticom to email it today, that's fine with us, too. We were just trying to raise it.

THE COURT: Okay. I hear you. Hold on for one second.

(Brief pause.)

THE COURT: I'm inclined to deal with it as part of the AutoLoop submission. I'm not inclined to go search through the piles of documents I have to find it and then to issue a ruling on it without having brought everybody back together.

I don't view that -- I mean, I understand why you are raising it as something that fell through the cracks. I'm not

prepared to rule now as to whether it was or wasn't part of the initial motion that was filed or it was amended back to the original time with your reply or whether it should or shouldn't have been included in this compendium of 29 documents.

And I also do not want to hold up my order -- my order of today and the requirement that the documents that we've dealt with for the last number of weeks be produced or that an appeal should be filed as to those documents if it's going to happen, because I just don't want to hold all of that up with -- and have this tail wag that dog.

So right now, if it's part of the AutoLoop submission, that's where I'm going to look at it. I'm not going to read through what I have to find it and amend what we've done now, because I don't know whether I would want additional argument from anybody on it having not looked at it right now. And I just don't want to delay anything.

So I think that's the best way not to delay something, frankly. But if after we get off somebody on the defense side disagrees, file something, and I'll deal with it. But I just -- I'm trying to wrestle down these documents and these issues on the Authenticom thing and then move to the next thing on my agenda.

MR. MacDONALD: And I don't --

THE COURT: Go ahead.

MR. MacDONALD: Your Honor, Ross MacDonald again.

That is -- that is fine by us.

I think Mr. Dorris mentioned at one point that in AutoLoop's reply they would advise the Court of where this document is. And so we would just request that just kind of for everyone's knowledge, if AutoLoop in its reply would be willing to drop a footnote explaining to the Court where the document is or if it's in AutoLoop's group of documents just so that everyone is aware, we would appreciate that.

MR. DORRIS: We will do that.

THE COURT: Okay. Thanks.

All right. With that, I'm prepared to recess. Is that okay with plaintiff?

MR. DORRIS: Yes, Your Honor.

THE COURT: And with CDK and Reynolds?

MS. MILLER: Yes, Your Honor.

THE COURT: All right.

MR. MacDONALD: Yes, Your Honor. Thank you for so much of your time today.

THE COURT: Okay. Good. Have a good rest of the day, good weekend, be safe, and I'll see you and talk to you whenever that occurs next. Okay?

MS. MILLER: Thank you, Your Honor. You as well.

THE COURT: Okay. Thank you very much. Bye-bye.

(Proceedings concluded.)

C E R T I F I C A T E

I, Nancy L. Bistany, certify that the foregoing is a complete, true, and accurate transcript from the telephonic record of proceedings on August 14, 2020, before the HON. JEFFREY T. GILBERT in the above-entitled matter, to the best of my ability.

/s/ Nancy L. Bistany, CSR, RPR, FCRR August 20, 2020

Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

Date